

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, et al.,

No. C 05-0962 SBA (JL)

Plaintiffs,
v.

**ORDER QUASHING SUBPOENAS
(Granting Docket # 24)**

LEXUS SERRAMONTE, ET AL.,

Defendants.

Introduction

Plaintiff Equal Employment Opportunity Commission (“EEOC”) brings this lawsuit on behalf of Annie Wei and other similarly situated female employees and former employees alleging sexual harassment by Defendants. Wei claims sexual harassment by fellow employees and supervisors and asks the court to compensate her for “emotional distress, indignity, loss of enjoyment of life, loss of self-esteem, and humiliation.” She does not claim ongoing emotional distress, nor does the EEOC intend to offer either expert testimony or evidence from any of her medical records to support Wei’s claim. Defendants subpoenaed records from all Wei’s subsequent employers as well as her health care providers dating back to her childhood. Defendants contend they need the subpoenaed documents to *inter alia* establish Wei’s veracity and whether she had a preexisting condition which caused her distress. The EEOC asserts Wei’s privacy rights and contend that she has not waived them

1 by bringing a “garden variety” claim for emotional distress. The EEOC asks this Court to
2 quash Defendants’ subpoenas.

3 All discovery in this case was referred by the district court (Hon. Sandra Brown
4 Armstrong) as provided by 28 U.S.C. §636(b) and Civil Local Rule 72.

5 After considering the written pleadings and oral arguments of counsel, this Court
6 hereby grants Plaintiff’s motion and quashes Defendants’ subpoenas.

7 **EEOC moves to Quash Defendants’ Subpoenas**

8 The EEOC moves the Court for an order quashing the subpoenas duces tecum
9 Defendants served on Wei’s employers after she quit Defendant Lexus including, San
10 Francisco Elk Lodge, The Gold Club, Penna Mechanical, and Biscuits and Blues; and her
11 health care providers including, Kaiser Permanente Medical Group South San Francisco,
12 Kaiser Billing c/o Healthcare Recoveries, Inc., Mental Health Department c/o Kaiser P.M.G.
13 South San Francisco, and Kaiser Foundation Hospital c/o Pharmacy Analytical Services.
14 The EEOC also asks the Court to enter a protective order preventing Defendants from
15 viewing and using any information obtained pursuant to said subpoenas. Some documents
16 had already been produced before the EEOC notified the responding parties of its concerns
17 and filed its motion to quash.

18 Defendants subpoenaed the following documents from Wei’s subsequent
19 employers:

20 Any and all documents concerning Annie Wei ... including, but not limited to, all
21 documents reflecting terms of employment, employment applications, resumes,
22 employment contracts, offer letters, document reflecting compensation and
23 earnings, description of job duties, discipline records, termination report, any
24 documents regarding internal complaints, claims or lawsuits filed against your
25 organization by this individual, absence records, incident reports, pre-employment
26 exam records to include typing tests and/or other administrative exams with the
27 results and answers, employee progress records, and documents reflecting benefits
28 including health care information and 401k retirement programs as well as any
documents included in the personnel file for Annie Wei.

Defendants also subpoenaed the following from Wei’s healthcare providers: All
documents and records, including, but not limited to, any and all treatment that Ms. Wei
has had with Kaiser Permanente spanning the entire time that she has been their patient.

1 Defendants subpoenaed from the healthcare billing departments: “Any and all
2 statements of billing charges” regarding any treatment that Ms. Wei had the entire time she
3 has been a Kaiser Permanente-South San Francisco patient. Ms. Wei has been a Kaiser
4 Permanente patient since childhood.

5 The EEOC contends that the Defendants’ subpoenas duces tecum seek information
6 that is lacking in specificity, not relevant to any claim or defense of any party, not
7 reasonably calculated to lead to the discovery of admissible evidence, overly broad, unduly
8 burdensome, or invade the privacy rights of Annie Wei, a claimant on whose behalf the
9 Commission seeks relief in this action.

10 **Counsel attempted to meet and confer**

11 In efforts to informally resolve this matter without court assistance, on January 12
12 and 13, 2006, the EEOC sent correspondence to defense counsel and exchanged voice
13 mail messages with him regarding all the subpoenas duces tecum which are now at issue.
14 EEOC counsel had been out of the office on leave and by the time she returned, the time to
15 respond to the subpoenas had arrived and Defendants’ counsel had himself departed for a
16 vacation. After a few missed communications and the intervention of the Court, a hearing
17 was set.

18 **ANALYSIS**

19 **Standing**

20 The EEOC has standing as Plaintiff to move to quash. It is immaterial that it has no
21 standing to object as the non-recipient of the subpoenas, since it has standing as Plaintiff to
22 file a motion to quash on all the same grounds. Fed. R. Civ. P. 26©); Rule 45(c)(3)(A)(iii).

23 **Employment Records**

24 Employment records should not be produced for two reasons:

25 1. They are cumulative, duplicative and irrelevant, since the EEOC has produced
26 and continues to produce evidence of Wei's mitigation of damages by her employment
27 subsequent to her quitting Lexus. Plaintiff has provided Defendants with documents
28 showing wages earned by Ms. Wei subsequent to her leaving Lexus, and is in the process

1 of providing further wage information to supplement this document production. (Esparza-
2 Cervantes Decl at ¶ 9, Pltf P&A at 15:2-4)

3 Similarly, financial documents, such as payroll records, credit verification
4 documents, wage garnishments, health insurance premiums paid through sources other
5 than employers and other private records related to Ms. Wei's finances are irrelevant to any
6 claims or defenses in this case.

7 2. Defendants seek information about any other harassment claims filed by Ms.
8 Wei *after her employment at Lexus* to try to establish a habit of filing such claims.

9 Similarly, Defendants seek evidence of Plaintiff's work performance at employers for whom
10 she worked after she left Lexus. Work performance with other employers, either before or
11 after the defendant employer, is inadmissible under Rule 404(a) Federal Rules of Evidence
12 (evidence of a trait or character to prove conduct in conformity therewith on a particular
13 occasion is inadmissible). *Rauh v Coyne, et al.*, 744 F. Supp. 1181, 1184 (D.D.C.1990).
14 Furthermore, the other jobs, as waitress and bookkeeper, were not comparable to Ms.
15 Wei's job as a car salesperson for Lexus.

16 Medical Records

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18 Medical records should not be produced because:

19 1. Ms. Wei has a right of privacy under both federal and California constitutions;
20 California Constitution, Article I, section 1; *Griswold v. Connecticut*, 381 U.S. 479, 484, 85
21 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965) (right to privacy is implied in the 1st, 3rd, 4th, 5th,
22 and 9th Amendments). See also, *Heda v. Superior Court*, 225 Cal.App.3d 525, 527, 275
23 Cal.Rptr. 136, 137 (1st Dist. 1990). *San Diego Trolley, Inc. v. Superior Court*, 87
24 Cal.App.4th 1083, 1092, 105 Cal.Rptr.2d 476, 481 (4th Dist. 2001). See also Health
25 Information Portability and Accountability Act ("HIPAA") 42 U.S.C. section 299b-2.
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1 2. Ms. Wei has not waived her right of privacy by asserting more than a garden-
2 variety claim of emotional distress. *Turner v Imperial Stores*, 161 F.R.D. 89, 97 (S.D.Cal.
3 1995). Defendants attempt to distinguish the case at bar from *Turner*, in which the court
4 held that a plaintiff had not waived privilege and did not have to submit to a Rule 35
5 medical examination, because they are not asking Wei to submit to a medical examination
6 but are attempting to obtain access to her medical records. This Court finds that if anything,
7 delving into a plaintiff's medical or psychiatric records is even more invasive than
8 conducting a medical or psychological examination, and that the standard for waiver should
9 be at least as rigorous as that in *Turner*. See *Fitzgerald v Cassil*, 216 F.R.D. 632, 636-638
10 (N.D. Cal. 2003), citing *Fritsch v. City of Chula Vista*, at 187 F.R.D. 614, 632 (S.D. Cal.
11 1999). In *Fritsch*, the defendant, as in this case, sought medical records unlimited as to
12 time: ("from her first visit to your offices to the present") *Id.* at 616. Even though the plaintiff
13 in that case claimed "severe" emotional distress, the magistrate judge found that this alone
14 did not justify disclosure of any medical records.

15 "[T]he plaintiff has not brought a claim for either intentional or negligent
16 infliction of emotional distress; she does not allege that she suffered a
17 psychiatric injury or disorder as a result of the defendants' conduct; she does
18 not claim to suffer from unusually severe emotional distress; and she does
19 not intend to offer expert testimony regarding her emotional distress. Rather,
20 she merely claims damages for emotional distress which she says she
21 suffered as a result of defendants' actions as alleged in the complaint. The
22 mental suffering Plaintiff claims "does not exceed the suffering and loss an
23 ordinary person would likely experience in similar circumstances," and
24 constitutes "matters that are within the everyday experience of the average
25 juror." Johnson [v. Trujillo], 977 P.2d 152 (Colo. 1999)], 977 P.2d 152, 157-
26 58."

27 *Fritsch*, 187 F.R.D. at 632.

28 3. The test of whether Defendants should obtain access to Ms. Wei's medical records
is not relevance -- the records may be highly relevant -- but the test is whether the privilege

1 has been waived by putting the privileged information “at issue.” *Fritsch*, 187 F.R.D. at 625-
2 626, *citing Vanderbilt v Town of Chilmark*, 174 F.R.D. 225 (D.Mass. 1997)(finding waiver of
3 psychotherapist-patient privilege if communication between the two is put at issue by the
4 patient, for example, where the case of action relies on advice or findings of the
5 psychotherapist. Under this measure of fairness, waiver prevents the privilege from being
6 used as both a sword and a shield). *Id.* at 229-30.

8 The test also no longer involves balancing privacy against such factors as the
9 usefulness of the evidence or a defendant’s need for it. *Fritsch*, 187 F.R.D. at 625-626,
10 *citing Jaffee v Redmond*, 518 U.S. 1, (1996). Wei has not waived privacy by intent to offer
11 expert testimony or other evidence of ongoing emotional distress or by alleging specific
12 psychiatric diagnosis or injury. *Turner, Id.*

14 In the case at bar, the EEOC expressly states that “Ms. Wei no longer has
15 symptoms of her distress, and Plaintiff will not seek to introduce expert testimony to
16 support the claims of emotional distress.” (Plaintiff’s P&A at 9: 16-18). “Consistent with the
17 information already provided to Defendants, Plaintiff volunteers that Ms. Wei has suffered
18 ‘garden-variety’ emotional distress. She experienced distress and humiliation and felt
19 attacked, and devalued as a woman. She had nervousness, was depressed and
20 occasionally cried. She sought medical treatment on one occasion, while she was working
21 with Lexus. *Yet the EEOC is not intending to use the treating physician’s testimony nor*
22 *present said information into evidence for the present suit.*” (Plaintiff’s P&A at 11:4-9)
23 (Emphasis added).

26 Ms. Wei’s medical records are privileged by her right to privacy under California and
27 federal law, and she brings only a “garden-variety” claim for emotional distress damages
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1 and she does not intend to rely on those records or on testimony by a medical or
2 psychiatric expert to support her claim. Consequently, she has not waived this privilege by
3 putting her medical or mental condition at issue.
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5 4. Defendants are not prejudiced because they will have an opportunity to depose
6 Ms. Wei to ascertain the extent and nature of her past emotional distress.
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Conclusion and Order

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9 For all the above reasons, Plaintiff's motion to quash Defendants' subpoenas is
10 granted.
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12 DATED: March 22, 2006
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15 JAMES LARSON
16 Chief Magistrate Judge
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